UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
Eastern Division

UNITED STATES OF AMERICA, *Plaintiff,* v. VILLAGE VOICE MEDIA, LLC, and NT MEDIA, LLC, *Defendants.*	Civil Action No. 1: 03CV0164 Judge Polster Filed: 5/2/03

RESPONSE TO PUBLIC COMMENTS

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the public comments received regarding the Proposed Final Judgment in this case.

I. Background

On January 27, 2003, the United States filed the Complaint in this matter to terminate the Defendants' illegal agreement to allocate markets for advertisers in, and readers of, alternative newsweeklies in metropolitan Cleveland, Ohio, and Los Angeles, California, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Simultaneously with the filing of the Complaint, the United States filed a Proposed Final Judgment. A Competitive Impact Statement ("CIS") was also filed with the Court on February 3, 2003, and published in the *Federal Register*, along with the Proposed Final Judgment, on February 12, 2003 (*see* 68 Fed. Reg. 7132). Pursuant to 15 U.S.C. § 16(c), a summary of the terms of the Proposed Final Judgment and CIS was published in *The Plain Dealer*

during the period of February 6 through 12, 2003, and *The Washington Post*, a newspaper of general circulation in the District of Columbia, during the period of February 14 through 20, 2003.

As explained more fully in the Complaint and CIS, prior to entering into their unlawful agreement, Defendants NT Media ("New Times") and Village Voice Media were head-to-head competitors in publishing alternative newsweeklies in Cleveland and Los Angeles. In October 2002, New Times agreed to shut down its Los Angeles alternative newsweekly, the *New Times Los Angeles*, if Village Voice Media closed its newsweekly in Cleveland, the *Cleveland Free Times*. Thus, Defendants "swapped" markets, leaving New Times with a monopoly in Cleveland and Village Voice Media with a monopoly in Los Angeles. This unlawful agreement eliminated the competition that had brought advertisers in both cities lower advertising rates, more promotional opportunities, and better service, and that had benefitted readers with a higher quality product.

The Proposed Final Judgment requires, in part, that New Times and Village Voice Media terminate their unlawful agreement, allow affected advertisers in Los Angeles and Cleveland to terminate their contracts, notify the United States before entering into any merger, sale, or joint venture involving their alternative newsweeklies, and divest the assets of the *New Times Los Angeles* and the *Cleveland Free Times* to new entrants in those markets. The proposed consent decree also prohibits the companies from entering into any market or customer allocation agreements in the future.

The sixty-day period for public comments expired on April 21, 2003. As of today, the United States has received written comments from: (1) Citizens for Voluntary Trade, whose president filed an *amicus* motion with this Court, (2) Gary Beberman, and (3) Denise D'Anne. The United States has carefully considered the views expressed in these comments, but nothing in the

comments has altered the United States' conclusion that the Proposed Final Judgment is in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is now filing with this Court its response to such comments. Once these comments and this response are published in the *Federal Register*, the United States will have fully complied with the Tunney Act and will file a motion for entry of the Proposed Final Judgment.

II. Response to Public Comments

A. Citizens for Voluntary Trade's Comment

In its written comment, Citizens for Voluntary Trade ("CVT") states that the First Amendment of the U.S. Constitution preempts the Proposed Final Judgment, as "[e]ven the most 'anti-competitive' conduct is protected by the First Amendment." (CVT Comment at 2, a copy of which is attached as Exhibit A.)

The Supreme Court as long ago as 1945 dismissed this assertion. The restraints imposed by these private arrangements are not protected by the First Amendment. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Neither news gathering nor news dissemination are being regulated by the Proposed Final Judgment, which addresses only the Defendants' *per se* illegal restraints on certain business or commercial practices. The Defendants' unreasonable restraints on competition—which the Proposed Final Judgment remedies—comport neither with the antitrust laws nor with the First Amendment. As the Supreme Court held in the *Associated Press* case, and reiterated twenty-four years later in the *Citizen Publishing* decision:

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides

> powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.[1]

In his *amicus* brief, S.M. Oliva, CVT's president, does not address the merits of the Proposed Final Judgment but rather objects to certain procedural aspects of the Proposed Final Judgment. In particular, Oliva alleges that the United States intentionally violated the Tunney Act by requiring the Defendants to complete certain divestitures within thirty days after the filing of the Complaint. (*Amicus* brief at 3, a copy of which is attached as Exhibit B.)

First, nothing in the Tunney Act precludes the United States from taking or refraining from certain actions during the sixty-day comment period. The statute also does not prohibit the Defendants from divesting certain assets and refraining from certain action before this Court enters the Proposed Final Judgment.

Second, contrary to Mr. Oliva's assertion, the required divestitures do not preclude this Court from evaluating whether entry of the Proposed Final Judgment is in the public interest or declining to enter the order if it believes the settlement is unacceptable. As Section IV(A) of the Hold Separate Stipulation and Order provides, the United States may withdraw its consent to the Proposed Final Judgment at any time before the entry of the Proposed Final Judgment. Moreover, the Hold

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[1] *Citizen Publ'g*, 394 U.S. at 139-40 (quoting *Associated Press*, 326 U.S. at 20).

Separate Stipulation and Order contemplates that this Court may not enter the Proposed Final Judgment. By divesting certain assets and refraining from any action in furtherance of their illegal market allocation agreement, the Defendants have assumed the risk that the United States might withdraw its consent and proceed to trial or that this Court may decline to enter the Proposed Final Judgment.

Furthermore, the divestitures at issue here are common in many other Tunney Act proceedings. It is customary in the vast majority of mergers that are resolved by consent in the form of proposed final judgments to permit the defendants to merge at the time when the complaint and proposed final judgment are filed, subject to the defendants' obligations under the proposed final judgment to take steps to divest certain specified assets. In these mergers, the defendants are generally allowed to complete the merger prior to the close of the sixty-day comment period and entry of the final judgment by the court. The defendants in such cases, as here, understand that the proposed final judgment is subject to public comment, that the United States may revoke its consent at any time before the final judgment is entered, and that the final judgment will not be entered unless a court finds that it is in the public interest.

Third, to delay any remedial measures until after the sixty-day comment period expires might undermine the effectiveness of the relief. As the CIS states, "[g]iven that Defendants had closed the *Cleveland Free Times* and *New Times Los Angeles* in October 2002, a quick and effective remedy was necessary to reestablish competition." (CIS at 14.) Readers and advertisers will sooner benefit in Cleveland and Los Angeles as a result of a quick and effective divestiture.

B. Gary Beberman's Comment

In his e-mail, Mr. Beberman writes that the United States "may have been correct that the Village voice was colluding in anti-competitive behavior" but that "their actions were merely attempts to survive." (A copy of Mr. Beberman's comment is attached as Exhibit C.) Mr. Beberman, however, never states whether he supports or opposes entry of the Proposed Final Judgment. And any critique of whether this investigation should have been brought in the first place amounts to a challenge of the initial exercise of the United States' prosecutorial discretion, which is outside the scope of this proceeding. *See, e.g.*, *United States v. Western Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (noting that Tunney Act proceeding does not permit "*de novo* determination of facts and issues" because "[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General") (citations omitted). Likewise, Mr. Beberman's comments about another case, *United States v. Microsoft Corp.*, are extraneous to this matter. (Also, the sixty-day comment period in that case ended on January 28, 2002, and the United States District Court for the District of Columbia entered the final judgment on November 12, 2002.)

C. Denise D'Anne's Comment

Ms. D'Anne thanked the United States for pursuing this action. (A copy of Ms. D'Anne's comment is attached as Exhibit D.)

III. Conclusion

After careful consideration of these public comments, the United States has concluded that entry of the Proposed Final Judgment will provide an effective and appropriate remedy for the

antitrust violation alleged in the Complaint, and is therefore in the public interest. Pursuant to Section 16(d) of the APPA, the United States is submitting these public comments and this response to the *Federal Register* for publication. After these comments and this response are published in the *Federal Register*, the United States will move this Court to enter the Proposed Final Judgment.

Dated: 2 May 2003
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Response to Public Comments via First Class United States Mail, this 2nd day of May, 2003, on:

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